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No. 98-382

In The

Supreme Court of the United States

October Term 1997

GENE SCHMIDT and PEGGY SCHMIDT, the heirs of Decedent STEPHANIE SCHMIDT, and GENE SCHMIDT, the special administrator of her Estate, on behalf of STEPHANIE SCHMIDT,

Petitioners,

v.

HTG, INC., THOMAS E. HAMILTON, the STATE OF KANSAS, KANSAS DEPARTMENT OF CORRECTIONS, and ROBERT SCHIRK,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kansas

BRIEF FOR RESPONDENTS STATE OF KANSAS, KANSAS DEPARTMENT OF CORRECTIONS AND ROBERT SCHIRK IN OPPOSITION

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BRIEF FOR RESPONDENTS STATE OF KANSAS, KANSAS DEPARTMENT OF CORRECTIONS AND ROBERT SCHIRK IN OPPOSITION

The State of Kansas, Kansas Department of Corrections and Robert Schirk ("state respondents") oppose the petition of Gene and Peggy Schmidt ("petitioners"), the heirs of decedent Stephanie Schmidt ("decedent"), and Gene Schmidt, the special administrator of her estate, on behalf of Stephanie Schmidt for a writ of certiorari to the United States Supreme Court.

STATEMENT OF THE CASE

The Statement of the Case as stated in the Petition for a Writ of Certiorari contains exaggerations and inaccuracies, but since they do not relate to the ground of the Kansas Supreme Court decision, there is no good reason to go into detailed factual matters here.

The facts with respect to petitioners' claims and alleged damages are fully reviewed in the Kansas Supreme Court opinion. [App. A4-A9] The evidence relating to the State of Kansas Department of Corrections Internal Management Policies and Procedures, which the petition does purport to summarize and interpret, is inaccurate, but would not warrant reversal of the Kansas Supreme Court since petitioners are not entitled to recover in the absence of any legal duty, the absence of any adequate proof of actual knowledge of a specific risk of harm to the decedent and where state officials, in any event, are entitled to immunity in accordance with clear exceptions to state tort claims act.

As the Court will discover when it compares the Petition for a Writ of Certiorari with the opinion of the Kansas Supreme Court, the questions which petitioners seek to present here do not pertain to the principal grounds upon which the Kansas Supreme Court decided the case. (The opinion of the Kansas Supreme Court is set forth as an Appendix in the Petition for a Writ of Certiorari to the Supreme Court of Kansas, hereinafter cited as App. A.)

The questions actually presented by the decision below are:

1. Whether parole officer's conduct establishes requisite elements under a Section 1983 claim of danger creation so that parole officer as a State actor may be held liable under the Due Process Clause to the United States Constitution for private misdeeds? [App. A11]

2. Whether parole officer owed duty to warn parolee's employer of parolee's criminal history and dangerous propensities such that liability could be imposed on a theory of negligence under state tort law? [App. A13]

3. Whether the Kansas Tort Claims Act, Kan. Stat. Ann. 75-6104, provides immunity to petitioners' claims for damages? [App. A27]

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT MEET THE REQUIREMENTS OF THIS COURT'S RULES FOR GRANTING A PETITION FOR WRIT OF CERTIORARI

Beyond doubt, the instant case in no way satisfies the standards set out in Rule 10 of the Supreme Court Rules for granting a petition for a writ of certiorari. The issues turning on the facts of record in the instant case (see App. A4-A9) are neither "compelling reasons" nor "an important federal question" involving conflicts with other decisions of this Court, the United States courts of appeals or the decision of another state court of last resort. The United States Supreme Court does not "grant certiorari to review evidence and discuss specific facts" (*United States v. Johnston*, 268 U.S. 220, 227 (1925)), except in extraordinary circumstances. The instant case presents no such extraordinary circumstance.

II.

THE STATE OF TORT LAW RELATING TO GOVERNMENTAL AND PUBLIC OFFICIAL LIABILITY DOES NOT WARRANT REVIEW BY THIS COURT

The decision of the Kansas Supreme Court was correct, turned on the evidence and the record in the case, and there is no good reason contemplated within the considerations governing review on certiorari to overturn that decision.

First, the decision that there was no genuine issue of material fact to preclude summary judgment is not challenged in the petition, and was clearly correct. The

unchallenged determination by the Kansas Supreme Court in the instant case that there was insufficient evidence of actual knowledge on the part of state officials of a specific risk of harm to decedent as an identifiable third party at risk from the criminal acts of this particular post-release supervised offender (Donald Ray Gideon) necessary to go to jury trial would inevitably be dispositive on remand.

Second, few points are raised in the petition about the reasoning and logic of the Kansas Supreme Court, and none would warrant a reversal of that court's judgment in this case. There was ample basis in pre-existing state and federal law for the Kansas Supreme Court to select the appropriate legal standards necessary to determine the proper resolution of the issues raised by the facts of the instant case.

In Kansas, as in the other identified jurisdictions, negligence exists only where there is a duty owed by one person to another, and a breach of that duty occurs. If recovery is to be had for such negligence, the injured party must show: (1) a causal connection between the duty breached and the injury received; and (2) he or she was damaged by the negligence. An accident, disaster, or calamity, which is not reasonable to be foreseen by the exercise of reasonable care and prudence, is not sufficient grounds for a negligence action.

In Kansas, it is a fundamental rule that actionable negligence must be based on a breach of duty. *Blackmore v. Auer*, 187 Kan. 434, 440, 357 P.2d 765 (1960). The decision in *Robertson v. City of Topeka*, 231 Kan. 358, 644 P.2d

458 (1982), recognized a special relationship between certain persons could give rise to a duty. Whether a duty exists is a question of law. Whether a duty has been breached is a question of fact. Further, whether there is a causal connection between the breached duty and the injuries sustained is also a question of fact. *Durflinger v. Artiles*, 234 Kan. 484, 488, 67 P.2d 86 (1983).

The Kansas Supreme Court recognized the duty to warn based upon an assertion that the plaintiff and the State had a special relationship in *Cansler v. State*, 234 Kan. 554, 675 P.2d 57 (1984), when the court adopted Restatement (Second) of Torts §§315 and 319 (1965). *Cansler* involved the armed escape of seven (7) convicted murderers from the Kansas State Penitentiary in Lansing, Leavenworth County, Kansas. No warning of this event issued to area law enforcement, of which plaintiff was a member. While attempting to stop a speeding vehicle, the plaintiff officer was seriously injured by the escaping felons. The officer filed suit against the State and Leavenworth County for his injuries. The Kansas Supreme Court held that under the Restatement, the State has a common law duty to confine the inmates and to warn upon their escape and, further, that the State has a special relationship with law enforcement officers in the surrounding community, including plaintiff. The Kansas court expressly took note, however, that the *Cansler* decision and its holding should be limited to its particular facts.

Just prior to the instant case, in *C.J.W. v. State*, 253 Kan. 1, Syl. ¶1, 853 P.2d 4 (1993), and *Cupples v. Kansas*, 18 Kan.App.2d 864, 861 P.2d 1360 (1993), the Kansas courts addressed the nature as well as the contours of the duty

of public employees to control the conduct of third persons so as to prevent them from intentionally harming others. The courts determined that whether such duty exists is a question of law. The courts held that in Kansas, this duty turns on whether the defendant has knowledge of a specific risk of harm to an identifiable victim.

In *Jarboe v. Board of Sedgwick County Comm'rs*, 262 Kan. 615, Syl. ¶1, 938 P.2d 1293 (1997), the Kansas Supreme Court held that prior case law permitting a duty to be based upon the failure to follow written personnel policies was superseded by the legislative enactment of Kan. Stat. Ann. 75-6104(d). In Kansas, liability can no longer be established by the failure to follow such a policy unless an independent duty of care is owed. Consistent with this result and holding is the recent case of *Woodruff v. City of Ottawa*, 263 Kan. 557, 566, 951 P.2d 953 (1997), where the Kansas Supreme Court also rejected the argument that an unwritten policy was created such that a police officer owed a duty to protect plaintiffs from the conduct of a third party.

Neither these legal standards, nor the outcome in the instant case, implicate an important federal question or involve conflicts with other decisions of this Court, the United States courts of appeal, or the decision of another State court of last resort contemplated by Rule 10 of the Supreme Court Rules for granting petitions for writ of certiorari.

The Kansas Supreme Court carefully distinguished the decisions from other jurisdictions upon which the plaintiffs rely, in particular *Division of Corrections v. Neakok*, 721 P.2d 1121 (Alaska 1986), and *Rieser v. District*

of Columbia, 563 F.2d 462 (D.C. 1977), upon their facts, as well as the differing basis for the legal conclusions reached in these other jurisdictions. A close reading of the authority asserted by petitioners in the instant case discloses these cases were rejected by the Kansas Supreme Court simply because they were inapposite to the facts presented and the issues raised therefore by the instant case. [App. A18-A26]

In *Taggart v. State*, 118 Wash.2d 195, 822 P.2d 243 (1992), suit was brought by plaintiffs injured by parolees in separate assaults on claims of negligent parole supervision because the parole officers never contacted the parolees' friends or employers, never required one parolee to submit to required drug testing, and/or knew that parolees had violated various conditions of parole by quitting job, changing address without notification and failing to report, but never took corrective action. Under these circumstances, the Washington court held that the State had a duty to protect against reasonably foreseeable dangers posed by the unchecked dangerous propensities of parolees. The parole officers completely abdicated their responsibility to maintain a "definite, established and continuing relationship" with the parolees under their supervision sufficient to bring the parole officers' conduct within the scope of Restatement (Second) of Tort provisions. Even so, the court held that the announced duty "arises only once it has been shown that the defendant parole officer lacks both absolute and qualified immunity. To pierce these immunities, the plaintiff must show, first, that the officer's actions were not an integral part of any judicial or quasi-judicial process, and second,

that the officer failed to perform a statutory duty according to procedures dictated by statute and superiors."

In *Division of Corrections v. Neakok*, 721 P.2d 1121 (Alaska 1986), suit was brought by relatives of murder victims of another parolee with whom the parole officer completely failed to maintain a definite, established and continuing relationship. The Alaska court essentially held that the failure to take charge of and to monitor the parolee in a remote settlement established the basis for a duty to protect against the reasonably foreseeable dangers posed by the unchecked dangerous propensities of this parolee.

There was no evidence in the record of the instant case of an identical, or even similar, complete abdication by the parole officer of his responsibility to take charge or to monitor the supervised offender. Nor was evidence presented which was sufficient to pierce the defendants' entitlement to immunity under the Kansas Tort Claims Act. The evidence in the instant case is that the parole officer did not neglect or fail to maintain a "definite, established and continuing relationship" with the parolee under his supervision. [App. A5-A8; App. A11-A13; App. A29-A30]

In *Rieser v. District of Columbia*, 562 F.2d 462 (D.C. Cir. 1977), father brought suit against the District of Columbia to recover damages for his daughter's rape and murder by a parolee employed at the apartment complex in which daughter resided. The circuit court held that an exception to the general rule of governmental non-liability applied to the parole officer because the parolee's

maintenance position made the parolee a "virtual member of the victim's household" with opportunity to closely monitor her habits and unfettered access to her home. In addition, the parole officer listed on an employment referral form only that the parolee has been convicted of robbery, failed to mention he was a convicted rapist, failed to mention that he was a suspect in three (3) murders which had occurred at the apartment community he had previously worked at, and placed no restrictions upon the type of work appropriate to him.

On similar grounds, in *Bonnie W. v. Commonwealth*, 643 N.E.2d 424, 419 Mass. 122 (1994), the Massachusetts court held, in a suit brought by a sexual assault victim based on the alleged negligence of her attacker's parole officer, that the state tort claims act did not bar "claim that officer contributed to injury by negligently recommending attacker's continuing employment at trailer park where victim lived and by misrepresenting attacker's criminal history to park management." Plaintiff's alternative theory based on negligent supervision or failure to supervise was held to be expressly barred by the state tort claims act, however. Plaintiff was sexually assaulted in her mobile trailer home located on leased space in a privately owned trailer park where the attacker was employed by the owners of the trailer park as a maintenance man and had keys to all the units in the park in connection with his employment.

In *Thompson v. County of Alameda*, 27 Cal.3d 741, 167 Cal.Rptr. 70, 614 P.2d 728 (1980), reh. denied (1980), judgment of dismissal was affirmed by the California court because the county was either statutorily immunized from liability or alternatively, bore no affirmative duty

that it failed to perform under the facts. Parents brought suit against the county for damages in the sexual assault and murder of their five (5) year old son by a juvenile delinquent known to have dangerous and violent propensities toward young children within twenty-four (24) hours after being released to the custody of his mother.

Third, the petition in the instant case essentially seeks review of discretionary civil agency enforcement action by a state agency which is inappropriate for judicial review pursuant to common law and which has, in Kansas, a constitutional Separation of Powers basis. In discussing discretionary immunity under the Kansas Tort Claims Act, Kan. Stat. Ann. 75-6104(e), the Kansas Supreme Court has repeatedly stated:

> "We do not believe that the legislature, in enacting the Kansas Tort Claims Act, intended to subject parole or probation decisions of the authorities, whether the Kansas Adult Authority or the sentencing judge, to litigation in order to determine whether the Authority or judge turned every tap and jumped through every hoop in arriving at a decision to place an inmate on parole or to impose conditions on conditional release. It is these discretionary functions of state agencies or employees which the legislature intended to place beyond the pale of tort litigation.
>
> The possibility of harm to third persons exists every time a prisoner convicted of violent crime is released from custody and placed back into society, yet the time always arrives when release must be effected."

Beck v. Kansas Adult Authority, 241 Kan. 13, 36, 735 P.2d 222 (1987). [App. A28-29]

Fourth, the consistent line of decisions of this Court specifically dealing with claims based on the criminal acts of offenders, prisoners, patients and others have uniformly held that public officials owe no legal duty arising from any special relationship with individual members of the public absent knowledge of a specific risk to an identifiable third party.

In *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980), suit was brought by the survivors for damages to recover for the torture and murder of a fifteen (15) year old girl by a parolee who had been released from prison despite his history as a sex offender. In addition, in making their release determination, public employees also failed to observe certain "requisite formalities." The parolee committed this heinous crime about five (5) months after his release.

The Court determined that under these circumstances, the decedent's death was too remote a consequence of the parole decision and of the parole officer's actions to hold them or the State responsible under the federal civil rights law. Citing *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), the Court held that the survivors simply had not alleged a claim for relief under federal law.

In *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989), this Court addressed the issue of imposing liability on the State as well as individual social workers for the negligent handling of child abuse reports. The child

was returned to his father by state child welfare authorities. He was left there even after state authorities received reports of severe child abuse. Ultimately, the child was beaten so severely he would be retarded for the rest of his life.

The Court held that the authorities were not liable under Section 1983; a State's failure to remove a child from his home even after receiving reports of severe child abuse did not violate the child's due process rights under the Fourteenth Amendment. Although the Court foreclosed the possibility of liability on this basis under the United States Constitution, the door was left open for the individual States to elect to create a duty of care under their own tort law.

The Court noted that the case would be different if the State had custody of the child and placed it with foster parents who it knew or strongly suspected would abuse the child, or if the State had arrested the parents and left the child alone in a situation where it was foreseeable he was likely to come to grief because no one was watching him.

In *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), cert. denied, 116 S.Ct. 924 (1996), suit was brought by the surviving husband of an activity therapist killed by a mental hospital patient against state mental health administrators for eliminating a special unit in the mental hospital under a creation of danger theory. The patient had formerly been confined in this special unit. This patient had attacked another patient in the past. He also had spent over a year in the general hospital population without incident.

The Tenth Circuit rejected this claim under the creation of danger theory and ruled for defendants on summary judgment, determining that plaintiff failed to demonstrate that defendants' decision to eliminate the special unit truly "shocked the conscience," for recklessness, and that in any event, defendants' qualified immunity shielded them from liability.

III.

WELL ESTABLISHED PRINCIPLES OF FEDERALISM AND STATE SOVEREIGNTY AS WELL AS A FEDERAL STATUTE, THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994 (COMMONLY KNOWN AS THE JACOB WETTERLING ACT), 42 U.S.C. §14071, RELIEVES THE COURT FROM THE NECESSITY OF ESTABLISHING NATIONWIDE STANDARDS FOR POST-RELEASE SUPERVISION OF OFFENDERS

Petitioners essentially argue for strict liability under the Fourteenth Amendment for crimes committed by sex offenders based on a theory that such crimes are a per se violation of substantive due process. In petitioners' view, the mere fact that sex offenders are "highly likely to reoffend" is alone sufficient to establish evidence of deliberate indifference and reckless disregard whenever the State or state actors fail to prevent such crimes from occurring. This failure constitutes the deliberate indifference and reckless disregard, they argue, constitutionally cognizable under the "shock the conscience" standard. "Big Brother" must be liable because the crime would not have occurred if he had not blinked. Consequently, national standards are indicated.

This is nonsense on stilts. These conclusory allegations are unsupported by the decisions of this Court, as well as the decisions in the Tenth Circuit, and Kansas appellate courts. Furthermore, petitioners' proposal that nationalized standards for post-release supervision of sex offenders are therefore necessary is proscribed by well-established principles of judicial restraint, federalism, and state sovereignty.

The State's interest in fashioning its own rules of tort law is paramount to any discernable federal interest in nationalized standards for the post-release supervision of offenders urged by petitioners in the instant case. Further, Kansas statutes and regulations have not been shown to be irrational or to regularly expose individual citizens to wholly arbitrary or irrational state action expressly prohibited by the United States Constitution.

In any event, any such nationalized standard for the post-release supervision of offenders is unwarranted for unnecessarily impinging on the Kansas legislature, as well as state judicial review of parole decisions, and would inevitably inhibit exercise of the State's discretion under its own Constitution, as well as impair the State's ability to implement a parole program tailored to promote rehabilitation of offenders in Kansas consistent with local resources, including the security within state prison facilities through the holding out of the promise of potential rewards for good behavior, voluntary participation in programs, and enhanced privilege classifications.

Petitioners rely on *Kansas v. Hendricks*, 117 S.Ct. 2072 (1997), to support their petition. This case is best understood and explained as a civil commitment case for the

treatment of sex offenders who suffer from a "mental abnormality" at the time of their release from prison. In this light, this Court's decision in *Hendricks* has few if any implications for Court-imposed nationalized standards in public safety laws. (In any event, there is no evidence in the record that Donald Ray Gideon was ever diagnosed or civilly adjudged "mentally abnormal" at the time of his release from prison; hence, *Hendricks* has no bearing on the resolution of the instant case.)

As a practical matter, virtually all of the States, with the financial encouragement of the federal government, now have sex offender registration laws. See 42 U.S.C. §14071, et seq.; see also *Megan's Law*, Pub. L. 104-145, 110 Stat. 1345 (May 17, 1996). Many states also provide for some form of community notification or public access to the registrant information. See generally, Stephen R. McAllister, *Neighbors Beware: The Constitutionality of State Sex Offender Registration and Notification Laws*, 29 Texas Tech. L. Rev ___ (1998).

In Kansas, the legislature has enacted the Kansas Sex Offender Registration Act (KSORA), Kan. Stat. Ann. 22-4901, et seq., which would appear to dispose of petitioners' claims concerning notification of the criminal history of individuals convicted of violent sex crimes. The constitutionality of the Kansas statute was upheld by the Kansas Supreme Court. See *State v. Myers*, 260 Kan. 669, 193 P.2d 1024 (1996) (under ex post facto analysis); and *State v. Scott*, No. 75,684 (Kansas Supreme Court, May 29, 1998) (under cruel and unusual analysis). The KSORA requires individuals convicted of a sexually violent crime to register with the State as a sex offender, as well as to provide DNA exemplars, including blood and saliva. The

purpose of the law is to protect people by providing the public with the broadest possible access to information about sex offenders in their communities.

Many other states now allow broad public access to sex offender registration information under legislative enactments similar to that in Kansas. Virtually every state permits some public access, and all require sex offenders to register. See, e.g., Alaska Stat. §12.63.010, et seq. (1996); Colo. Rev. Stat. §18-3-412.5 (1997 Supp.); Fla. Stat. §944.606 (1997); Hawaii Rev. Stat. §846E-1, et seq. (1997); Iowa Code §692A.1 , et seq. (1998 Supp.); Mass. Gen. L. Ch. 6, §178C, et seq. (1996); Mich. Comp. Laws Ann. §28.721, et seq. (1997).

IV.

THE GRANT OF A WRIT OF CERTIORARI IS NOT WARRANTED BECAUSE THE LAW IN THE TENTH CIRCUIT IS CLEARLY ESTABLISHED AND CONSISTENT WITH THIS COURT'S RECENT DECISIONS

Petitioners allege state respondents violated decedent's Fourteenth Amendment right to substantive due process by creating a dangerous situation and failing to protect decedent from a third party, resulting in her death. Petitioners contend that all government conduct that is indifferent to life, liberty, or property violates the Due Process Clause, and that their allegations of such executive abuse based on state respondents' failure to notify the decedent and/or the supervised post-release offender's employer of his criminal history states a cognizable claim of deliberate indifference to or reckless disregard for a person's right to life and personal security

which "shocks the conscience." Against this backdrop, petitioners urge that the grant of a Writ of Certiorari to the United States Supreme Court is necessary to establish an objective standard for this test which will resolve conflicts among the circuit courts of appeal as well as the subjectivity present in the judges who sit in the Tenth Circuit.

This Court granted certiorari, 520 U.S. ___, 117 S.Ct. 2406, 138 L.Ed.2d 173 (1997), in the case of *County of Sacramento v. Lewis*, 523 U.S. ___, 118 S.Ct. ___, 140 L.Ed.2d 1043 (1998), precisely to resolve conflict among the circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process. In *Lewis*, suit was brought by the personal representative of the estate of the decedent, a sixteen (16) year old motorcycle passenger killed as a result of being accidentally struck by a deputy's patrol car at the end of a high speed chase, for the recovery of damages under the Due Process Clause of the Fourteenth Amendment. At issue in the case was whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high speed automobile chase aimed at apprehending a suspected offender.

The Court has consistently emphasized, time and time again, that "[t]he touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Although the specific focus of the Court in *Lewis* was high speed pursuit by police officers, legal analysis in the case broadly encompassed objective determination of the constitutionally cognizable

level of executive abuse, deliberate indifference to, or reckless disregard for, a person's right to life and personal security which "shocks the conscience." This determination was chiefly posited on the Court's recognition of conflict among the circuits, i.e., comparing *Lewis v. Sacramento*, 98 F.3d 434, 441 (9th Cir. 1996) ("deliberate indifference" or "reckless disregard"); *Evans v. Avery*, 100 F.3d 1033, 1038 (1st Cir. 1996) ("shocks the conscience"), cert. denied, 520 U.S. ___, 117 S.Ct. 1693, 137 L.Ed.2d 820 (1997); *Foy v. Berea*, 58 F.3d 227, 239 (6th Cir. 1995) (6th Circuit more likely to now apply "deliberate indifference" standard rather than "gross negligence" standard); *Williams v. Denver*, 99 F.3d 1009, 1014-1015 (10th Cir. 1996) ("shocks the conscience"); *Fagen v. Vineland*, 22 F.3d 1296, 1306-1307 (3d Cir. 1994) (en banc) ("shocks the conscience"); *Temkin v. Frederick County Commissioners*, 945 F.2d 716, 720 (4th Cir. 1991) ("shocks the conscience"), cert. denied, 502 U.S. 1095, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992); and *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) ("shocks the conscience").

In *Lewis*, the Court held that only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience necessary for a due process violation. The deputy's response to the motorcycle driver's lawless behavior in driving at high speed, ignoring another police officer's attempts to stop the motorcycle, and speeding off does not shock the conscience where there is no reason to believe the law enforcement officer held an improper or malicious motive.

The Court's holding in *Lewis* is consistent with the clearly established law in the Tenth Circuit regarding

claims that executive decisions by public officials violated an individual's Fourteenth Amendment right to substantive due process. The Court in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989), concluded that as a general matter, a state's failure to protect an individual against private violence does not constitute a violation of the Due Process Clause. The Tenth Circuit has interpreted *DeShaney* as carving out two exceptions to this rule: (1) the special relationship doctrine; and (2) the danger creation theory. *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 924, 133 L.Ed.2d 853 (1996).

The *Uhlrig* court turned to this Court's decision of *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), for guidance in considering the scope of substantive due process violations. *Uhlrig*, supra, 64 F.3d at 573. *Uhlrig* cited *Collins* for the proposition that the standard for judging a substantive due process claim is whether government action would " 'shock the conscience' of federal judges." *Id.* See also *Collins*, supra, 503 U.S. at 128, 112 S.Ct. at 1070. *Uhlrig* states that to "shock the conscience" means the conduct must involve a degree of outrageousness and a magnitude of potential harm or actual harm that is truly "conscience shocking." *Uhlrig*, supra, 64 F.3d at 574.

Despite outward appearances resulting from the use of the term to define the term, the "shock the conscience" standard applied in the Tenth Circuit is not ambiguous or unclear for standing in a circular cul de sac. The decision in *Uhlrig* was not announced in a vacuum. The Tenth Circuit in *Medina v. City and County of Denver*, 960 F.2d

1493, 1499 (10th Cir. 1992), has provided clear directions concerning circumstances which suggest a "reckless" state actor might be liable for the actions of a third party. *Medina*, supra, 960 F.2d at 1499. In *Medina*, suit was brought by a bicyclist, injured when he was struck by a suspected felon during a high speed automobile chase, against the municipality and law enforcement officers based on the claims they violated substantive due process by unnecessarily creating a dangerous situation and failed to protect him from the third party suspect.

The court determined that for purposes of Section 1983, it is not adequate to show that the defendant merely acted recklessly in disregard of a known risk to the public at large. *Medina*, 960 F.2d at 1496. Rather, the defendant's conduct must be directed toward the plaintiff. *Id.* Additionally, four prerequisites must also be present. *Id.* The court also noted that an act is reckless when it reflects a wanton or obdurate disregard or complete indifference to risk, for example, "when the actor does not care whether the other person lives or dies, despite knowing that there is a significant risk of death" or grievous bodily injury. *Id.* (citations omitted). Summary judgment was granted in favor of police officers on the basis of qualified immunity and also in favor of the city and county absent evidence of any policy or practice that amounted to deliberate indifference toward bystanders.

The alleged need to resolve conflict among the circuits or to resolve ambiguity between judges in the Tenth Circuit does not therefore constitute legitimate grounds to warrant the grant of a Writ of Certiorari in this case. The objective character of the substantive due process analysis provided by this Court in *County of Sacramento v.*

Lewis, supra, together with the Court's opinions in *Collins v. City of Harker Heights*, supra, and *Washington v. Glucksberg*, 521 U.S. ___, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), is more than adequate response to this request by petitioners.

Moreover, to hold that all government conduct deliberately indifferent to life, liberty, or property violates the Due Process Clause as petitioners urge would require this Court to make the Fourteenth Amendment a font of tort law. This notion is completely at odds with the intent of the Framers as well as the repeated determinations of the Court. "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 333, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). "[T]he Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) (citations omitted).

The alleged need to resolve conflict between circuit courts is likewise unwarranted as a legitimate basis for calling upon this Court to revisit the doctrine of qualified immunity. It is beyond questioning that the parole officer in the instant case was acting in an official capacity as a public official within the scope of discretionary authority sufficient to establish his entitlement to the shield of Eleventh Amendment immunity in his official capacity, as well as the shield of qualified immunity afforded by *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396 (1982),

and *Procunier v. Navarette*, 434 U.S. 555, 561-62, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978) (prison officials and officers are provided qualified immunity from damages for acts performed in the course of official conduct), in his personal or individual capacity. [App. A27-A30] Additionally, this Court's recent review of qualified immunity makes it abundantly clear that existing procedures available to judges are adequate for use in handling claims that involve examination of an official's state of mind, such as in the determination whether decisions, actions or conduct of public officials rise to a level of recklessness or deliberate indifference which "shocks the conscience." See *Crawford-El v. Britton*, No. 96-827 (U.S. Supreme Court, May 4, 1998).

V.

CONCLUSION

For the foregoing reasons – and particularly because the petition does not and cannot challenge the clearly correct rulings of the Kansas Supreme Court which in themselves support its decision in the instant case – this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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